ДОСВІД ЗАРУБІЖНИХ КОЛЕГ

STATES' TITLE TO TERRITORY IN REMOTE AREAS AND INDIGENOUS PEOPLES IN THE ARCTIC

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Annotation: Until recently, indigenous peoples were ignored in international law. In recent decades, their legal status has significantly improved, although the full scope of their rights is still being discussed. Remote areas which have been home to indigenous peoples have long been misunderstood as being terra nullius, that is, open for acquisition – a view which has only changed in the last century. The acquisition of territory without regard for the local population is no longer compatible with international law. Statehood requires not only a territory and a people but also the effective exercise of public authority. Such exercise of authority can play a role – if it is legitimate – in the establishment of a legal title to a territory. In remote and sparsely settled areas, it can be argued that the level of authority which is to be exercised may be lower than elsewhere. It might be sufficient for a state to simply have a better title to a territory than an other state in order to establish a legal title. Yet, this does not mean that the local population, which is the original holder of the title, can be ignored because they, too, have a status under international law.

Анотація: Довгий час міжнародне право ігнорувало проблему прав корінних народів. Ситуація почала змінюватися останні двадцять років, тим не менш, правовий статус цієї категорії осіб, як і раніше викликає дискусії. Віддалені і важкодоступні території, що є місцем проживання корінних народів, традиційно розглядалися як *terra nullius*, нічийні землі, відкриті для володіння. Такий підхід був переглянутий у кінці минулого століття.

Володіння територією без урахування волевиявлення корінних народів, які її населяють, суперечить нормам сучасного міжнародного права. Державність передбачає наявність не тільки території і населення, але й ефективне здійснення публічної влади. Останнє має значення для встановлення титульної приналежності території. Можна стверджувати, що здійснення публічної влади на віддалених і важкодоступних територіях ускладнено, проте в разі територіальних суперечок держава повинна довести факт управління цією територією як підтвердження її державної приналежності. При цьому повинні враховуватися права корінних народів, які є первинними власниками титулу, оскільки їхній статус визнаний міжнародним правом.

Аннотация: Долгое время международное право игнорировало проблему прав коренных народов. Ситуация стала меняться последние двадцать лет, тем не менее, правовой статус этой категории лиц по-прежнему вызывает дискуссии. Отдаленные и труднодоступные территории, являющиеся местом обитания коренных народов, традиционно рассматривались как *terra nullius*, ничейные территории, открытие для владения. Такой подход был пересмотрен в конце прошлого века. Владение территорией без учета волеизъявления коренных народов, которые ее населяют, противоречит нормам современного международного права. Государственность предполагает наличие не только территории и населения, но и эффективное осуществление публичной власти. Последнее имеет значение для установления титульной принадлежности территории. Можно утверждать, что осуществление публичной власти на отдаленных и труднодоступных территориях осложнено, тем не менее в случае территориальных споров государство должно доказать факт управления этой территорией как подтверждение ее государственной принадлежности. При этом должны учитываться права коренных народов, которые являются первоначальными владельцами титула, так как их права признаны международным правом.

When it is necessary to determine which State has title to a certain area, one will have to look at it from a historic perspective. Therefore, one takes one point in time when the legal status has been clear and then looks at the different events that happened and then determine how these events change the title to the territory in question. Because of the doctrine of intertemporal international law, the international law rules which applied at the time in question are to be applied. It is important not only to show some kind of title, following specific categories such as cession or discovery, but a «better right to possess in contentious titles» [1, p. 130; 7, p. 47]. «In some cases the sheer ambiguity of the facts will lead the Court to rely on matters which are less than fundamental, and in this class of case there is a tendency to seek evidence of acquiescence by one party» [1, p. 161]. As we will see, acquiescence will indeed turn out to be one of the key issues in this case.

Up to the 17th century, discovery, claiming and occupying[2, 198] a territory which were not otherwise inhabited (terra nullius) were sufficient in order to gain legal title. The idea of terra nullius essentially means that a specific piece of territory had not yet been claimed by an other subject of international law. While today the notion that a territory which is settled e.g. by indigenous peoples is terra nullius is no longer maintained [7, p. 1], this was not the law in the 17th century, the time when many colonializing states pushed into the Arctic.

This leaves open the question whether, at the time of discovery, the mere discovery of a territory, followed by a claim to sovereignty over it, was sufficient to establish

a legal title. Between 1400 and 1800 «no state appeared to regard mere discovery, in the sense of «physical» discovery or simple «visual apprehension», as being in any way sufficient per se to establish a right of sovereignty over, or a valid title to, terra nullius. Furthermore, mere disembarkation upon any portion of such regions-or even extended penetration and exploration therein-was not regarded as sufficient itself to establish such a right or title [...] the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient per se to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, «effective occupation». A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state» [5, p. 31].

This has been elaborated in detail in the Clipperton Island Case between France and Mexico, which was decided in 1932 [9, p. 390-394]. In the Clipperton Island case, the Arbitrator, King Victor Emmanuel III, gave particular attention to the factual exercise of power: «It is beyond doubt that by immemorial usage having the force of law, besides the animus occupandi, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby complete» [9, p. 393-394].

Today, discovery is no longer a reason to get a title to a territory – but because of the idea of intertemporal international law [1, p. 126-127] the legal concept has to be taken into account since it was a legally relevant category hundreds of years ago when the Arctic was colonialized by Germanic and Russian settlers. This view is challenged by national decisions such as Mabo v. Queensland [6] but not even this landmark decision has not lead to the nation state giving up its claim to title to territory. While patently unjust from the perspective of indigenous rights, there is at present no norm of customary international law to the effect that original indigenous sovereignty would trump the concept of intertemporal international law. International law, as it is today, does not recognize an independent indigenous title to territory on par with the title enjoyed by states, although indigenous rights can lead not only to land use rights but also to outright land ownership within national legal systems.

Intertemporal international law requires that the rules in force at the time in question of the acquisition of a title to territory apply [10, p. 193]. That means that a State may have acquired title by discovery at a time in the past when discovery still was a valid means of acquiring such title. Intertemporal law does not require to always comply with all changing rules regarding the acquisition of territory [2, p. 198].

Mere exploration and mapping do not give rise to a title on the part of the colonial nation state. Even if such maps would have been used in an official functions, this would not have been sufficient to establish a legal title in the absence of effective occupation of the lands. Often, the first attempts at effective occupation and administration of indigenous lands included taxation of indigenous populations by colonial states. Only later the provision of public services began to play a significant role, usually in the form of creating infrastructure and providing security.

«[P]ractice, as well as doctrine, recognises that [...] the continuous and peaceful display of territorial sovereignty [peaceful in relation to other States] is as good as a title» [10, p. 191]. If we assume that indigenous peoples had original sovereignty, the question has to be asked if there was resistance to such taxation attempts. Would the colonializing state's claim have been directed towards land which had also been claimed by an other state, the other state's failure to object could be interpreted as amounting to acquiescence. Failing to object to an other sovereign's claims to land can be a factor in the establishment of legal title for the outsider because de lege lata what matters is the existence of an effective occupation [3, p. 345]. States have to exercise effective jurisdiction over the territory in question. State power over a territory has to be effective [4, p. 89], which, in principle, requires the government to be able to control the entirety of both the territory and the population [4, p. 89] by creating and enforcing laws [4, p. 89]. This raises the question as to the nature of the exercise of jurisdiction. How detailed this jurisdiction has to be in order to be considered to be sufficiently effective can vary from case to case, depending on factors such as the local population density and the ease of access to the area. It follows that less is required from a State when it comes to the exercise of jurisdiction over a remote, thinly settled, area north of the Polar Circle as compared to more accessible areas. In so far, the effectiveness of the exercise of public authority can be relative.

«As the Permanent Court [of International Justice] states in the case concerning the Legal Status of Eastern Greenland, a claim to sovereignty based upon continued display of authority involves «two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of such authority». True, the Permanent Court recognized that in the case of claims to sovereignty over areas of thinly populated or unsettled countries, «very little in the way of actual exercise of sovereign rights» [11, p. 203] might be sufficient in the absence of a competing claim» [8, p. 208].

It is enough for the establishment of a legal title to have a better claim than the competing state rather than an absolute claim, as has already been held by the Permanent Court of International Justice in the East Greenland case:

«It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries» [11, p. 203].

This effective exercise of power goes beyond that of any other nation. Such effective occupation often has been established by nation states at the detriment of Arctic indigenous peoples.

The result that it is easier to attain title to territory in the Arctic or similarly sparsely populated areas shows that international law continues to be biased against indigenous peoples. While terra nullius has been given up as a legal concept, its spirit is still very much alive, thanks to the principle of intertemporal international law. The latter principle remains a necessity within international law as it guarantees legal certainty. Current international law is based on the concept of sovereign equality of states, a notion which excludes indigenous peoples perse. In this system, indigenous peoples have been able to carve out a niche for themselves in the last decades through an increased role at the United Nations. These efforts are still restricted to the rights of indigenous peoples but they do not yet impact general public international law. As long as this will continue to be the case, regaining indigenous sovereignty will remain difficult.

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